

Phelps Dodge Miami, Inc.
MINE & SMELTER

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105

2002 SEP -6 PM 1:47

U.S. EPA, REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF:

Phelps Dodge Miami, Inc.

Respondent.

) Docket No. CERCLA-9-2002-0005

) ADMIN DOCKET 2002-14 (09/23/02)

) COMPLAINT AND CONSENT

) AGREEMENT AND FINAL ORDER

COMPLAINT AND CONSENT AGREEMENT

A. PRELIMINARY STATEMENT

1. This is a civil administrative enforcement action initiated pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as amended, 42 U.S.C. § 9609, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, as revised by 64 Fed. Reg. 141 (July 23, 1999). Complainant is the United States Environmental Protection Agency, Region IX ("EPA"). Respondent is Phelps Dodge Miami, Inc. ("Respondent").
2. Respondent, an Arizona corporation, operates a copper smelter at Inspiration Road (New Street) in Claypool, Arizona (the "Facility"). *mine & smelter*
3. This Complaint and Consent Agreement and Final Order ("CA/FO"), pursuant to 40 C.F.R. § 22.13(b), simultaneously commences and concludes this proceeding, wherein EPA alleges that Respondent, at the Facility, violated Section 103 of CERCLA, 42 U.S.C. § 9603, and its implementing regulations.

B. GENERAL ALLEGATIONS

4. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
5. The real property and improvements thereto located at the Facility is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
6. The Administrator of the EPA, as required under Section 102(a) of CERCLA, 42 U.S.C. § 9602(a), has published a list of substances designated as "Hazardous Substances," which, when released into the environment, may present substantial danger to public health or welfare or the environment, and has promulgated regulations establishing the quantity of certain Hazardous Substances, the releases of which are required to be reported under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a). This list, including the corresponding reportable quantity ("RQ") for each Hazardous Substance, is codified at 40 C.F.R. Part 302, Table 302.4.
7. Sulfuric acid, Chemical Abstract Service Registry ("CAS") Number 7664-93-9 is a "Hazardous Substance" as defined under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), with an RQ of one thousand (1,000) pounds as designated in 40 C.F.R. Part 302, Table 302.4.
8. Electroplating sludge, RCRA Waste Number F006, is a "Hazardous Substance" as defined under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), with an RQ of ten (10) pounds as designated in 40 C.F.R. Part 302, Table 302.4.
9. At all times relevant to this CA/FO, the Facility produced, used or stored Hazardous Substances including sulfuric acid.
10. At all times relevant to this CA/FO, Respondent has been the owner and operator of the Facility.
11. Any person in charge of a facility is required under CERCLA Section 103(a), 42 U.S.C.

§ 9603(a), and 40 C.F.R. § 302.6(a), to immediately notify the National Response Center ("NRC") as soon as the person in charge has knowledge of a release of a Hazardous Substance from such facility in an amount equal to or greater than the RQ.

12. Based on information supplied by Respondent, EPA alleges that Respondent has violated Section 103 of CERCLA, 42 U.S.C. § 9603, and its implementing regulations. Respondent neither admits nor denies this allegation.

13. Respondent is subject to the powers vested in the EPA Administrator by Section 109 of CERCLA, 42 U.S.C. § 9609.

14. Section 109 of CERCLA, 42 U.S.C. § 9609, authorizes the assessment of a civil penalty for any violation of Section 103 of CERCLA, 42 U.S.C. § 9603.

15. The Administrator of EPA has delegated this authority under CERCLA to the Regional Administrators by EPA delegations 22-3-A and 14-31 respectively, dated October 31, 1989, and September 13, 1987. The Regional Administrator, EPA Region IX, in turn, has delegated the authority to the Director of the Superfund Division.

C. ALLEGED VIOLATIONS

COUNT I

(Violation of Section 103 of CERCLA on October 25, 2000)

16. Paragraphs 1 through 15 above are incorporated herein by this reference as if they were set forth here in their entirety.

17. On October 25, 2000, at approximately 5:00 AM Mountain Standard Time ("MST"), more than 1,000 pounds of sulfuric acid were released into the environment due to the overfilling of a holding tank at the Facility.

18. Respondent had actual or constructive knowledge of this release of sulfuric acid close to

the time it occurred.

19. Respondent did not notify the NRC of this release of sulfuric acid as required under Section 103 of CERCLA, 42 U.S.C. § 9603, until 12:35 PM MST on October 25, 2000.

20. Therefore, EPA alleges that Respondent failed to immediately notify the NRC of the release of a reportable quantity of a Hazardous Substance in violation of Section 103 of CERCLA, 42 U.S.C. § 9603.

COUNT II

(Violation of Section 103 of CERCLA on December 22, 1998)

21. Paragraphs 1 through 15 above are incorporated herein by this reference as if they were set forth here in their entirety.

22. On December 22, 1998, at approximately 9:45 AM MST, more than 10 pounds of electroplating sludge was released to the environment due to an accident while unloading a bag of such material from a truck at the Facility.

23. Respondent had actual or constructive knowledge of this release of electroplating sludge at approximately 10:30 AM MST on December 22, 1998.

24. Respondent did not notify the NRC of this release of electroplating sludge, as required under Section 103 of CERCLA, 42 U.S.C. § 9603, until 12:05 PM MST on December 22, 1998.

25. Therefore, EPA alleges that Respondent failed to immediately notify the NRC of the release of a reportable quantity of a Hazardous Substance in violation of Section 103 of CERCLA, 42 U.S.C. § 9603.

D. CIVIL PENALTY

26. Section 109 of CERCLA, 42 U.S.C. § 9609, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, see 61 Fed. Reg. 69360 (Dec. 31, 1996),

authorizes a civil penalty of up to TWENTY-SEVEN THOUSAND, FIVE HUNDRED DOLLARS (\$27,500) per day for violations of Section 103 of CERCLA, 42 U.S.C. § 9603.

27. Based on the facts alleged herein and upon all the factors which the Complainant considers pursuant to the Enforcement Response Policy for Sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act ("ERP"), dated September 29, 1999, including the nature, circumstances, extent, and gravity of the violations, the Respondent's ability to pay, prior history of violations, degree of culpability, and any economic benefit, and such other matters as justice may require, the Complainant proposes that the Respondent be assessed, and Respondent agrees to pay TWENTY-SIX THOUSAND DOLLARS (\$26,000) as the civil penalty for the violations alleged herein. The proposed penalty was calculated in accordance with the ERP.

E. ADMISSIONS AND WAIVERS OF RIGHTS

28. Respondent admits and agrees that EPA has jurisdiction and authority over the subject matter of the action commenced in this CA/FO and over Respondent pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, and 40 C.F.R. Part 22. Respondent consents to and agrees not to contest EPA's jurisdiction and authority to enter into and issue this CA/FO and to enforce its terms. Further, Respondent will not contest EPA's jurisdiction and authority to compel compliance with this CA/FO in any enforcement proceedings, either administrative or judicial, or to impose sanctions for violations of this CA/FO.

29. Respondent neither admits nor denies any allegations of fact or law set forth in Section C of this CA/FO. Respondent hereby waives any rights Respondent may have to a hearing, a review or an appeal on any issue relating to the factual allegations or legal conclusions set forth in this CA/FO, including without limitation a hearing or review pursuant to Section 109 of CERCLA, 42

U.S.C. § 9609. Respondent hereby consents to the terms of this CA/FO and the issuance of this CA/FO without adjudication.

30. Complainant and Respondent agree that settlement of this matter is in the public interest and that entry of this CA/FO without further litigation is the most appropriate means of resolving this matter.

F. PARTIES BOUND

31. This CA/FO shall apply to and be binding upon Respondent and its agents, successors and assigns and upon all persons acting under or for Respondent, until such time as the civil penalty required under Section D and any delays in performance and/or stipulated penalties have been resolved. At such time as those matters are concluded, this CA/FO shall terminate and constitute full and complete settlement of the violations alleged herein.

32. No change in ownership or corporate, partnership or legal status relating to the Facility will in any way alter Respondent's obligations and responsibilities under this CA/FO.

33. Until termination of this CA/FO, Respondent shall give notice of this CA/FO to any successor in interest prior to transfer of ownership or operation of the Facility and shall notify EPA within seven (7) days prior to such transfer.

34. The undersigned representative of Respondent hereby certifies that he is fully authorized by Respondent to enter into and execute this CA/FO, and to legally bind Respondent to it.

G. CERTIFICATION OF COMPLIANCE

35. Upon signing this CA/FO, Respondent certifies to EPA that it has fully complied with the requirements of Section 103 of CERCLA that formed the basis for the violations alleged in this CA/FO, and that the Facility is now in compliance with the relevant current reporting obligations under Section 103 of CERCLA.

36. The signatory for Respondent certifies under penalty of law that this certification of compliance is based upon true, accurate and complete information, which the signatory can verify personally or regarding which the signatory has inquired of the person or persons directly responsible for gathering the information.

H. PAYMENT OF CIVIL PENALTY

37. Respondent consents to the assessment of and agrees to pay a civil penalty of **TWENTY-SIX THOUSAND DOLLARS (\$26,000)** in settlement of the civil penalty claims made in this CA/FO.

38. Respondent shall pay the civil penalty within thirty (30) days of the Effective Date of this CA/FO, by a certified or cashier's check in the amount of **TWENTY-SIX THOUSAND DOLLARS (\$26,000)**, payable to "EPA Hazardous Substance Superfund," which Respondent shall send to:

U.S. EPA, Region IX
Attn: Superfund Accounting
P.O. Box 360863M
Pittsburgh, PA 15251

Attn: Donald Loi

39. The check shall reference the name and docket number of this CA/FO (CERCLA-9-2002-0005), and shall be accompanied by a cover letter stating that payment is being made pursuant to this CA/FO. The cover letter and civil penalty shall be sent by certified mail, return receipt requested. Copies of the transmittals shall be sent to:

Joshua Wirtschafter (ORC-3)
Assistant Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

and

Regional Hearing Clerk (ORC-1)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

40. In accordance with the Debt Collection Act of 1982 and U.S. Treasury directive (TFRM 6-8000), failure to send the penalty by the due date will result in imposition of interest from the effective date of this CA/FO at the current interest rate published by the U.S. Treasury, as described at 40 C.F.R. §13.11. In addition, a twelve percent (12%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the due date.

41. The penalties specified in this CA/FO shall represent civil penalties assessed by EPA and shall not be deducted by Respondent or any other person or entity for federal, state or local taxation purposes.

I. DELAY IN PERFORMANCE / STIPULATED PENALTIES

42. In addition to the interest and per annum penalties described above, in the event that Respondent fails to pay the full amount of the penalty within the time specified in Section H of this CA/FO, Respondent agrees to pay Complainant a stipulated penalty in the amount of TWO THOUSAND, FIVE HUNDRED DOLLARS (\$2,500) for each day that default continues. Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day until performance is complete. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of a written demand by Complainant for such penalties. Payment of stipulated penalties for failure to make the payment described in Section H of this CA/FO shall be made in accordance with the procedure set forth for payment of penalties in Section H of this CA/FO.

43. If a stipulated penalty is not paid in full, interest shall begin to accrue on the unpaid balance at the end of the fifteen-day period at the current rate published by the United States Treasury, as described at 40 C.F.R. §13.11. Complainant reserves the right to take any additional action, including but not limited to, the imposition of civil penalties, to enforce compliance with this Agreement or with CERCLA and their implementing regulations.

44. The payment of stipulated penalties specified in this Section shall not be deducted by Respondent or any other person or entity for federal, state or local taxation purposes.

J. RESERVATION OF RIGHTS

45. EPA expressly reserves all rights and defenses that it may have.

46. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, including the right to require that Respondent perform tasks in addition to those required by this CA/FO. EPA further reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, which may pertain to Respondent's failure to comply with any of the requirements of this CA/FO, including without limitation, the assessment of penalties under CERCLA or any other statutory, regulatory or common law enforcement authority of the United States.

47. Except to the extent provided in paragraph 31 of Section F, above, this CA/FO shall not be construed as a covenant not to sue, release, waiver or limitation of any rights, remedies, powers or authorities, civil or criminal, which Complainant has under CERCLA or any other statutory, regulatory or common law enforcement authority of the United States.

48. Compliance by Respondent with the terms of this CA/FO shall not relieve Respondent of its obligations to comply with CERCLA or any other applicable local, state or federal laws and regulations.

49. The entry of this CA/FO and Respondent's consent to comply shall not limit or otherwise preclude EPA from taking additional enforcement actions should EPA determine that such actions are warranted except as they relate to those matters resolved by this CA/FO.

50. EPA reserves its right to seek reimbursement from Respondent for such additional costs as may be incurred by the United States. Notwithstanding compliance with the terms of this CA/FO, Respondent is not released from liability, if any, for the costs of any response actions taken by EPA.

K. MISCELLANEOUS

51. This CA/FO may be amended or modified only by written agreement executed by both EPA and Respondent.

52. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

53. Each party to this action shall bear its own costs and attorneys' fees.

54. Complainant and Respondent consent to entry of this CA/FO without further notice.

55. The Effective Date of this CA/FO is the date the Final Order is signed by the Regional Judicial Officer.

IT IS SO AGREED.

8/23/02
Date

Allan F. Tittes
Allan F. Tittes, President
Phelps Dodge Miami, Inc.

9/5/02
Date

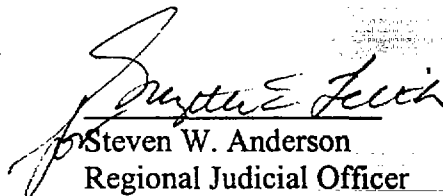
Jane Diamond
Jane Diamond, Director
Acting Superfund Division
U.S. Environmental Protection Agency,
Region IX

FINAL ORDER

IT IS HEREBY ORDERED that this Complaint, Consent Agreement and Final Order ("CA/FO") (Docket Nos. CERCLA-9-2002-0005) be entered and that Respondent pay a civil penalty of **TWENTY-SIX THOUSAND DOLLARS (\$26,000)**, payable to "EPA Hazardous Substance Superfund," in the manner and form specified in Section H of this CA/FO within thirty (30) days after the Effective Date of this CA/FO, and complete any and all tasks required by this CA/FO.

THIS FINAL ORDER SHALL BE EFFECTIVE IMMEDIATELY.

5 Sept 02
Date


Steven W. Anderson
Regional Judicial Officer

U.S. Environmental Protection Agency, Region IX

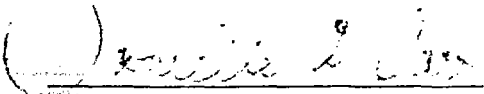
CERTIFIED MAIL NO. 7000-0520-0021-6105-4777
RETURN RECEIPT REQUESTED
Re: Phelps Dodge Miami, Inc.
Docket No. CERCLA 9-2002-0005

CERTIFICATE OF SERVICE

I hereby certify that a fully executed copy of the Complaint, Consent Agreement and Final Order in the Matter of Phelps Dodge Miami, Inc., Docket No. CERCLA 9-2002-0005, was sent certified mail, return receipt requested, to:

David J. Armstrong
Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225

9/10/02
Date


Danielle Carr
Regional Hearing Clerk
United States, EPA, Region IX
Office of Regional Counsel